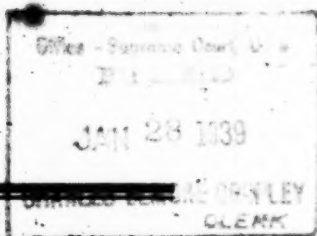


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# In The Supreme Court of The United States

October Term, 1938

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No. 509

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DENIS J. DRISCOLL, THOMAS C. BUCHANAN,  
DONALD M. LIVINGSTON, RICHARD J.  
BEAMISH, and JOHN SULLIVAN, Individ-  
ually and Constituting PENNSYLVANIA PUB-  
LIC UTILITY COMMISSION, and UTILITY  
CONSUMERS LEAGUE OF YORK, PA.,  
Appellants,

v.

EDISON LIGHT & POWER COMPANY,  
Appellee.

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On Appeal from the District Court of the United  
States for the Eastern District of Pennsylvania

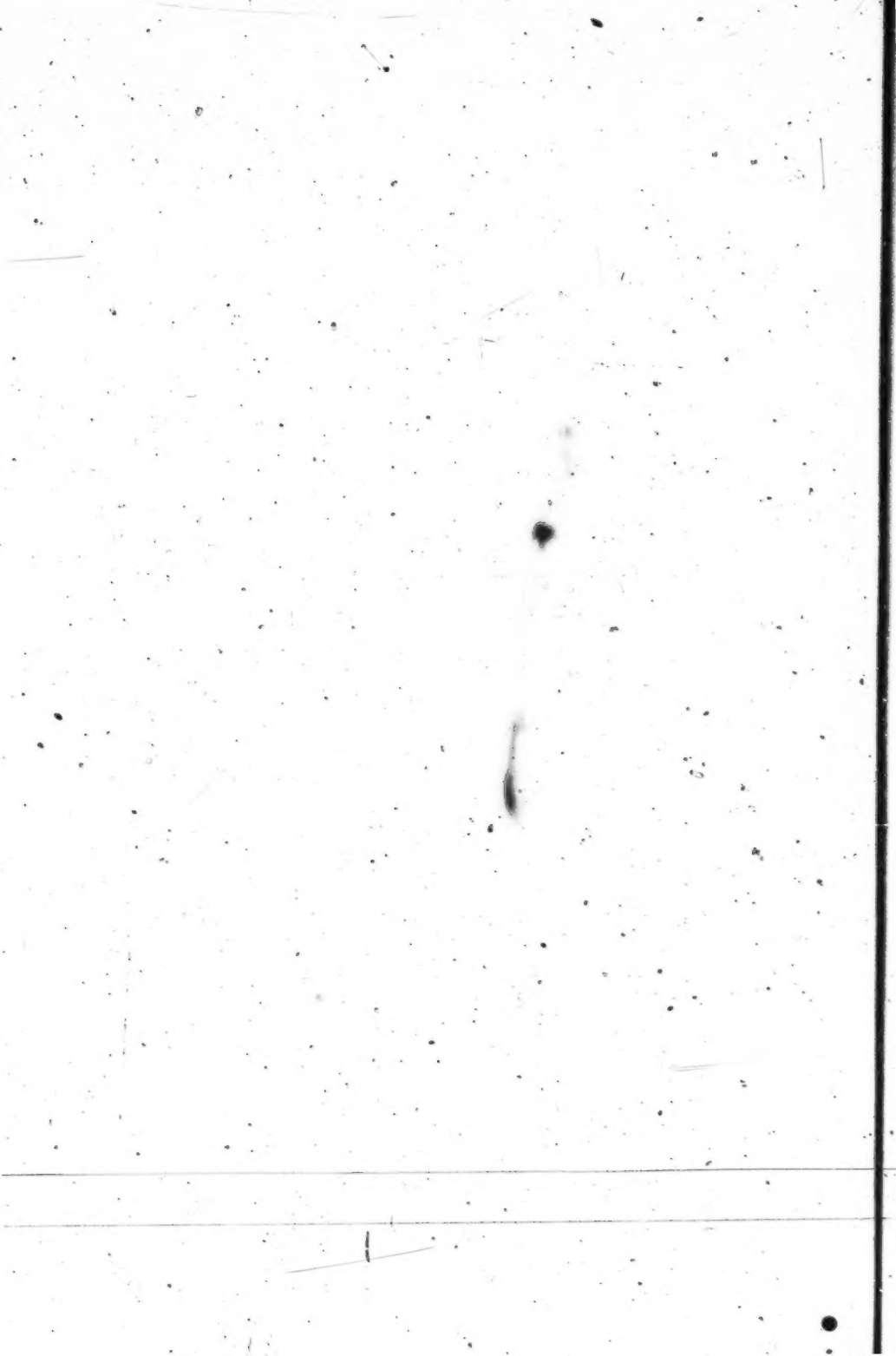
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BRIEF FOR UTILITY CONSUMERS' LEAGUE  
OF YORK, PENNSYLVANIA

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HERBERT B. COHEN,  
Counsel,  
124 East Market Street,  
York, Pennsylvania.

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*Opinions Below*

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## **OPINIONS BELOW**

The order of Pennsylvania Public Utility Commis-  
sion is reported in 17 Pennsylvania Public Utility  
Commission Reports 380, and in 21 Public Utility  
Reporter (New Series) 328. The opinion of the Dis-  
trict Court for the Eastern District of Pennsylvania  
is reported in 25 F. Supp. 192 (1938).

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article XIV, Section 1, of the Amendments to the Federal Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 310 of the Pennsylvania Public Utility Law (Act of May 28, 1937, Pamphlet Laws 1053, Purdon's Pennsylvania Statutes Annotated 1938 Supplement, Title 66, Section 1150) provides (omitting paragraph (d) which is not here in issue):

"Temporary Rates.—(a) The commission may, in any proceeding involving the rates of a public utility brought either upon its own motion or upon complaint, after reasonable notice and hearing, if it be of opinion that the public interest so requires, immediately fix, determine, and prescribe temporary rates to be charged by such public utility, pending the final determination of such rate proceeding. Such temporary rates, so fixed, determined, and prescribed, shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property (when first devoted to public use) of such public util-

ity, used and useful in the public service, and if the duly verified reports of such public utility to the commission do not show such original cost, less accrued depreciation, of such property, the commission may estimate such cost less depreciation and fix, determine, and prescribe rates as hereinbefore provided.

“(b) If any public utility does not have continuing property records, kept in the manner prescribed by the commission, under the provisions of section five hundred two of this act, then the commission, after reasonable notice and hearing, may establish temporary rates which shall be sufficient to provide a return of not less than an amount equal to the operating income for the year ending December thirty-first, one thousand nine hundred thirty-five, or such other subsequent year as the commission may deem proper, to be determined on the basis of data appearing in the annual report of such public utility to the commission for the year one thousand nine hundred thirty-five, or such other subsequent year as the commission may deem proper, plus or minus such return as the commission may prescribe from time to time upon such net changes of the physical property as are reported to and approved for rate-making purposes by the commission. In determining the net changes of the physical property, the commission may, in its discretion, deduct from gross additions to such physical property the amount charged to operating expenses for depreciation or, in lieu thereof, it may determine such net changes by deducting retirements from the gross additions; Provided, That the commission, in determining the basis for temporary



4      *Constitutional Provision and Statute Involved.*

rates, may make such adjustments in the annual report data as may, in the judgment of the commission, be necessary and proper.      A

“(c) The commission may, in the manner hereinbefore set forth, fix, determine, and prescribe temporary rates every month, or at any other interval, if it be of opinion that the public interest so requires, and the existence of proceedings begun for the purpose of establishing final rates shall not prevent the commission from changing every month, or at any other interval, such temporary rates as it has previously fixed, determined, and prescribed.

(d) \* \* \*

“(e) Temporary rates so fixed, determined, and prescribed under this section shall be effective until the final determination of the rate proceeding, unless terminated sooner by the commission. In every proceeding in which temporary rates are fixed, determined and prescribed, under this section, the commission shall consider the effect of such rates in fixing, determining, and prescribing rates to be thereafter demanded or received by such public utility on final determination of the rate proceeding. If, upon final disposition of the issues involved in such proceeding, the rates as finally determined, are in excess of the rates prescribed in such temporary order, then such public utility shall be permitted to amortize and recover, by means of a temporary increase over and above the rates finally determined, such sum as shall represent the difference between the gross income obtained from the rates prescribed in such temporary order and the gross income which

would have been obtained under the rates finally determined if applied during the period such temporary order was in effect."

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**STATEMENT OF THE CASE**

Utility Consumers League of York, Pennsylvania, one of the appellants, is an unincorporated association of consumers of electric current in the City of York, Pennsylvania. Appellee is Edison Light & Power Company, a public utility engaged solely in intrastate commerce and rendering electric service to the public in the City of York and contiguous territory. Appellee serves approximately 30,000 customers. Edison Light & Power Company has no funded debt. All of its capital stock is owned by York Railways Company and is pledged as security for the funded debt of York Railways Company. The common stock of York Railways Company is wholly owned by NYPANJ, a holding company in the Associated Gas & Electric Company system.

On the 27th day of January, 1936, a Commission inquiry and investigation was instituted to determine the reasonableness of the rates of Edison Light & Power Company under the provisions of the then substantive regulatory law of the Commonwealth of Pennsylvania, 1913, P. L. 1374. Several hearings were held at which testimony was presented. During the progress of this case, the utility law of the Commonwealth of Pennsylvania was recodified, the Act of 1913, P. L. 1374, was repealed, and, in lieu thereof, the Legislature enacted the Public Utility Law of 1937, P. L. 1053. (Purdon's Pennsylvania Statutes Annotated, 1938 Supplement, Title 66, Section 1101).

Section 310 of the new Public Utility Law authorizes the Commission, during the pendency of a rate

case, to prescribe temporary rates, the effect of which rates must be considered by the Commission in prescribing final rates at the termination of the general rate proceeding. After notice of the intention on the part of the Commission to prescribe temporary rates, and after argument before the Commission, the Commission, on July 27, 1937, issued a temporary rate order against Edison Light & Power Company. The order directed the company to revise its tariff to effect a reduction of the gross annual revenues in the sum of \$435,000.

A bill in equity was filed by the company in the United States District Court for the Middle District of Pennsylvania. A temporary restraining order was issued by the Court, restraining the Commission from enforcing its order. The cause was heard before a three-judge court, as provided by Section 266 of the Judicial Code. Following the taking of testimony and argument, the Court, on October 15, 1937, permanently enjoined the order of the Commission. Each of the Judges who constituted the special court wrote an opinion in the matter. Two of the judges, Judge Johnson and Judge Watson, held that the temporary rate provisions of the Public Utility Law did not offend constitutional limitations, but that the order of the Commission failed to indicate the bases or the findings upon which the Commission prescribed its rate reductions. The opinion of Judge Davis agreed that the Commission had insufficiently indicated the bases of its order, but further held that the temporary rate provisions authorizing the fixing of rates based upon the original cost of the property of the company were unconstitutional, since they failed to take cognizance of the standards prescribed by the Court in the case of *Smyth v. Ames*,

169 U. S. 466, and cases following that decision. The opinions aforesaid are reported in 21 F. Supp. 1.

Following the decision of the Middle District Court, the Commission issued a supplemental temporary rate order in which it reviewed much of the record and set forth at length the bases for its findings. The company was again ordered to revise its tariffs to effect a reduction in the annual gross operating revenues in the sum of \$435,000. The Commission order (R. 15) gave consideration to the reproduction cost evidence, to the original cost evidence, and to the other matters of record. The order referred to the fact that it involved merely temporary rates, and reserved doubtful points for consideration in a final order.

The Commission found that, for the purpose of fixing temporary rates, the value of the company property was \$5,250,000. The order of the Commission indicates that it accepted almost entirely the operating expenses claimed by and experienced by the company, and allowed them for temporary rate purposes. The annual allowances for operating expenses, depreciation, and return of 6 per cent upon the aforesaid value of \$5,250,000 totaled \$1,697,829. The actual experience of the company showed annual gross operating revenues of \$2,202,329 for the 12-month period ending September 30, 1937, an excess of \$504,500 over the revenues found allowable. The Commission, however, prescribed temporary rates to effect a reduction of only \$435,000.

The company then filed a bill to enjoin the order of the Commission of November 30, 1937, aforesaid, in the United States District Court for the Eastern District of Pennsylvania (R. 4). The jurisdiction

of the Eastern District Court was predicated upon the fact that one of the Public Utility Commissioners resides within the Eastern District. A three-judge court was again constituted, under the provisions of Section 266 of the Judicial Code. A temporary injunction was issued. Testimony was taken and argument had before the three-judge court for the Eastern District on January 17, 1938, and, on October 14, 1938, the preliminary injunction was made permanent. The opinion of the Court (25 F. Supp. 192) was written by Judge Davis, who, following the opinion he had rendered sitting in the Middle District, held that the Act offended constitutional restrictions in that it failed to direct the Commission to consider the elements of fair value prescribed in **Smyth v. Ames**, (169 U. S. 466), and cases following that decision, and that the temporary rates would result in confiscation of the company property. It is from this order that this appeal has been taken.



**SPECIFICATION OF ERRORS TO BE URGED.**

The United States District Court for the Eastern District of Pennsylvania erred:

1. In holding that Section 310 of the Pennsylvania Public Utility Law is unconstitutional as contravening the Fourteenth Amendment.

2. In holding that the findings and conclusions of the Pennsylvania Public Utility Commission Order of November 30, 1937, are not supported by substantial record evidence.

3. In holding that Pennsylvania Public Utility Commission, in computing temporary rates, improperly disallowed certain operating expenses claimed by appellee.

4. In holding that the temporary rates fixed by Pennsylvania Public Utility Commission were confiscatory.

5. In failing to dismiss the bill of complaint for want of equity, and in failing to dissolve the temporary restraining order theretofore entered.

6. In entering its final decree of October 14, 1938, permanently enjoining enforcement of the temporary rates prescribed by Pennsylvania Public Utility Commission on November 30, 1937, cancelling appellee's injunction bond and imposing all costs on Pennsylvania Public Utility Commission and its members.

I

**SUMMARY OF ARGUMENT**

Section 310 of the Pennsylvania Public Utility Law is constitutional:

The question of constitutionality was raised in the case of **Edison Light & Power Co. v. Driscoll, et al.**, 21 F. Supp. 1. That case involved a prior temporary order of rate reduction by the present appellant against the present appellee. It involved the same questions as to the constitutionality of the Pennsylvania Utility Law (Sec. 310 (a)-(c)-(e)). Two of the three judges specially sitting as a Statutory Court under Section 266 of the Judicial Code in the United States District Court for the Middle District of Pennsylvania, specifically held the Act constitutional.

II

The appellee in the instant case has been afforded procedural due process. Before the present order of November 30, 1937, was issued, more than a dozen hearings were held. Testimony of appellee's witnesses and experts, as well as the testimony of witnesses and experts of the Public Service Commission, now the Pennsylvania Public Utility Commission, was taken. The order of November 30, 1937, sets forth with particularity the basis for the rate reduction made thereby.



## III

The recoupment provision of the Pennsylvania Public Utility Law affords the appellee substantive due process. When a State Law gives the utility the right to recoup if temporary rates are later found to have been too low, the question of confiscation cannot arise when the validity of a temporary rate is in issue.

The Pennsylvania Legislature recognized that a public utility corporation is entitled to a fair return upon its property. It therefore provided means by which this return may be guaranteed, namely, recoupment. If a temporary rate of return is fairly arrived at after notice and hearing, the utility should not be heard to complain, and this Court, or any other Court, should not be asked to probe into details as to how the temporary return was arrived at. It is to the advantage of the Courts, rate making bodies, utilities and consumers alike to establish the principle that temporary rates fixed fairly, honestly and not arbitrarily, are properly provided by the Legislature.

## IV

Upon all of the facts and the law, the injunction restraining the enforcement of the temporary rate order of the Commission should be dissolved.

**ARGUMENT****I****Section 310 of Article III of the Pennsylvania Public Utility Law Is Constitutional.**

On July 27, 1937, the Pennsylvania Public Utility Commission, appellant herein, issued a temporary order requiring the Edison Light and Power Co., appellee herein, to make a reduction of \$435,000.00 annual gross operating revenue. The appellee herein filed a bill of complaint (R. 4) to the said order in the Federal Statutory Court for the Middle District of Pennsylvania at Scranton. This court was composed of the Hon. J. Warren Davis, Circuit Judge, Hon. Albert L. Watson, District Judge, and the Hon. Albert W. Johnson, District Judge.

That bill of complaint involved identical parties complainant and identical parties respondent as are complainant and respondent in the instant case. The first complaint was based upon the same facts and raised the same questions of law with respect to the constitutionality of Section 310 Article III of the Pennsylvania Public Utility Law, as were raised by the appellee in the court below.

Pursuant to the bill of complaint filed before the aforementioned statutory court, the said Court, on October 15, 1937, to No. 1289 June Term, 1937, In Equity, filed separate opinions relative to the said matter, which opinions are reported in 21 F. Supp. 1.

By the opinion of Albert W. Johnson, D. J. (21 F. Supp 1) and the opinion of Albert L. Watson, D. J.

(21 F. Supp. 5) the Court there held Section 310 of Article III of the Pennsylvania Public Utility Law to be in compliance with the Constitution of the United States of America and the Fourteenth Amendment thereto.

The report and order now in question was merely a revision of the order before that Court. It was revised to comply with the majority opinion. For reasons known only to itself, the appellee did not complain to the court of original jurisdiction but to a Statutory Court for the Eastern District of Pennsylvania. The appellee raised the same questions of law in its bill of complaint before the Middle District Court as are raised here (R. 4). This court should not permit the decision of the Middle District to be set aside by a Court of similar status. To do so would be to allow a complainant to go from one statutory court to another so long as one of the parties resided in the district in question, or until a favorable decision was obtained.

This point of res adjudicata as to the constitutionality of the Pennsylvania Public Utility Law was raised by the interveners in their answer filed to the bill of complaint in the court below (R. 68). It was not answered by the court.

## II

**The Edison Light & Power Co. has been Afforded Procedural Due Process in the Instant Case.**

The Edison Light & Power Co. was given ample opportunity to be heard in hearings conducted by the Public Service Commission, and its successor, the Public Utility Commission.

On January 27, 1936, the Public Service Commis-

sion on its own motion began an investigation into the rates of the Edison Light & Power Co.

On October 28, 1936, the first hearings were held in the matter before Commissioner Stahlnecker, of the Pennsylvania Public Service Commission. A total of thirteen hearings were held during the next year. The final hearing was held on June 23, 1937. In fact, it may be noted, that at one stage of this litigation the appellee company felt that they had been afforded so much procedural due process that they opposed the imposition of the temporary rate on the ground that the commission should issue a permanent order, since all the facts were before it. (R. 996).

### **III**

**The Recoupment Provision of the Pennsylvania Public Utility Law, Section 310 (e), Affords the Appellee Substantive Due Process:**

#### **A.**

**A recoupment provision as to temporary rates removes confiscation as a factor to be reviewed by the courts of law.**

For years one of the most difficult problems of administrative government has been the honest and final determination of rate litigation by an administrative body acting on behalf of the legislature. It is a problem that has vexed legislative bodies and their administrative arms, the utility commissioners. It is one that has vexed the courts. So many are the factors that enter into the determination of a rate in almost every case; so variable are those factors as litigation proceeds, that a long time is consumed before a rate is finally placed in effect.

**The recoupment provision of the Pennsylvania**

Public Utility Law gives this Court an opportunity to relieve courts of law of the undesirable and unpopular task of determining whether a temporary rate is confiscatory.

This court has most recently set forth the test to be applied by the court in determining whether a utility is afforded the due process of law to which it is entitled under the Constitution of the United States, in **Railroad Commission v. Pacific Gas & Electric Co.**, 302 U. S. 388; 87 L. Ed. 327, 330.

"While a fair and open hearing must be accorded as an inexorable safeguard, we do not sit as an appellate board of revision but to enforce constitutional rights. **San Diego Land & Town Co. v. Jasper**, 189 U. S. 439, 446. When the rate-making agency of the State gives a fair hearing, receives and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily, the requirements of procedural due process are met, and the question that remains for this Court, or a lower federal court, is not as to the mere correctness of the method and reasoning adopted by the regulating agency but whether the rates it fixes will result in confiscation."

That the first of these factors has been complied with in the instant case is not seriously disputed. It is respectfully urged by counsel for the appellant that when a temporary rate order is attacked, and the rate-making agency of the State has given a fair hearing, received and considered the competent evidence that is offered, afforded opportunity through evidence and argument to challenge the result, and

made its determination upon evidence and not arbitrarily, the sole question that remains for this court or a lower court is whether the statute under which the temporary rate order was issued provides for re-ouppment in case the rates are later found to have been too low.

We respectfully submit that this court would be amply justified in finding as a matter of law that temporary rates fixed in accordance with the Pennsylvania Public Utility Act do not violate the Fourteenth Amendment to the Constitution of the United States.

The Pennsylvania Legislature of 1937 fully recognized that consumers have long been suffering from the delay occasioned by rate proceedings. It sought to provide a means whereby the consumers would be given immediate relief and at the same time the utility could be protected from the result of an honest error in judgment by the Commission in fixing a temporary rate lower than was later determined to be justifiable.

As was stated by Judge Johnson in **Edison Light & Power Co. v. Driscoll, et al.**, *supra*, page 4:

"It was the evident purpose of the Pennsylvania Legislature, in passing this Act, to meet the criticism of the Prendergast case (*Prendergast v. New York Tel. Co.*, 262 U. S. 43), and to remove the burden placed upon the consuming public."

That Section 310 (e) affords the utility ample protection was the opinion of Judges Watson and Johnson in the case above referred to (21 F. Supp. 1, 4).

The purpose of a temporary rate is to force a public utility to give the consumer the benefit of reason-



able rates pending the proceedings to fix a final rate. These proceedings often last for years, and meanwhile, if no temporary rates are fixed, the public is required to pay unreasonable rates and the utilities are meanwhile permitted to make unreasonable profits:

Experience has shown that in the past the average time consumed by rate proceedings from their inception to their conclusion has been four years.

During the course of such litigation considerable expenses are incurred and the patience of the public and the consumers involved becomes exhausted. The result is that rate litigation has caused a wide-spread disrespect for democratic institutions by the people and has occasioned a hostile attitude toward utilities and toward the courts themselves. The instant case is a striking example of the evils sought to be remedied by the Pennsylvania Act.

On January 27, 1936, the Public Service Commission, predecessor to the Public Utility Commission, appellant herein, instituted, on its own motion, an investigation to determine the reasonableness of the rates and charges of the Edison Light & Power Company, appellee. Investigations were made and hearings held until June, 1937. On July 13, 1937, the Commission issued its first report and ordered a temporary rate reduction of \$435,000. On July 27, 1937, the Commission rescinded its prior order and issued a supplemental order making a like reduction. Since that time, by means of injunction, first in the District Court of the United States for the Middle District of Pennsylvania and later in the United States District Court for the Eastern District, which injunction is the subject of this appeal, the Edison Light & Power Co. has been successful in

preventing the consumers of York from having the advantage of a reduction in their rates to which it has been determined they are justly entitled by evidence produced before the rate making arm of the Legislature of the Commonwealth of Pennsylvania.

If a determination of this proceeding does not permit the temporary reduction ordered by the appellant, even more litigation must result before the consumers of the appellee receive a single cent of reduction in their rates.

### B.

**Temporary rates have many administrative advantages.**

There are numerous advantages of a temporary rate. Such a rate enables the public to receive a reduction in rates pending the determination of many intricate and variable problems involved in fixing the final and permanent rate. It provides the test tube in which by actual experience and practical use a rate based on theory can be definitely tested out. It eliminates the maze of formulas and the jungle of metaphysical concepts sometimes conceived, and often fostered, by the ingenuity of those who seek inflated valuations to support excessive rates.

The purpose and effect of the recoupment clause is to give the utility complete protection against any loss or confiscation resulting from temporary rates.

By this clause, if the temporary rate shall prove to be below the figure to which the utility is entitled, then when fixing the final and permanent rate, the rate making body is under the **legal duty** of fixing a rate which will enable the utility to recoup its loss. What can be fairer? By what method could the requirements of due process of law be better served?



The theory of monetary compensation for loss is the whole basis of the common law. It is the basis on which the person who is injured recovers damages for his injury. It is the basis upon which injuries are rectified and rights are sustained. It is not a new departure in the law to take property prior to paying for its taking. That theory has been applied under all systems of jurisprudence and is well known to us in the field of eminent domain, both in the taking by governmental agencies and the taking by private corporations. Even in equity where the basis is specific performance and specific remedy by use of injunction, the parties enjoined are protected by a bond which will return to him monetary damages if it shall be finally determined that the injunction was not proper.

It is not only the utility that is entitled to due process of law, but the public as well. If the property of the utility is confiscated by too low a rate, the property of the public is confiscated by too high a rate. The remedy that the public has where too high a rate has been imposed by a utility is reparation. The remedy given to the utility by the Pennsylvania Act where too low a rate has been established is recoupment. In both cases there is a temporary deprivation of property subject to later rectification by monetary compensation.

Surely, if reparation meets the constitutional requirements, temporary rates with recoupment provisions must also be constitutional. The whole apparent purpose of the Pennsylvania Act is that the temporary rate reduction ordered and the recoupment provision be taken together whenever the question of the propriety of the rate is in issue. If this is done the question of confiscation is removed entirely from a temporary rate proceeding and the courts are

relieved from the undesirable task of becoming a fact finding body in every rate case. The sole problem for the Court is whether or not procedural due process has been followed and the rate determined by the Commission has been applied after deliberation, and not capriciously or arbitrarily. To hold otherwise would be to destroy the very advantages that the Pennsylvania Legislature sought to give to the consumers and to the utility by its temporary rate provision with recoupment clause.

If a utility is permitted to continue to prolong rate proceedings by applying to the courts, even though a recoupment provision exists, the purpose for which a temporary rate statute was enacted is nullified.

## CONCLUSION

It is therefore respectfully urged by the Utility Consumers League of the City of York, York County, Pennsylvania, that your Honorable Court take the following action on this appeal:

- (a) Vacate the injunction issued by the United States District Court for the Eastern District of Pennsylvania, and direct that the Edison Light & Power Co. comply with the order of the Public Utility Commission issued November 30, 1937.
- (b) Find that the Pennsylvania Public Utility Law and especially Section 310 thereof is constitutional.
- (c) Find that the order of the Pennsylvania Public Utility Commission in the instant case affords the Edison Light & Power Co.

*Conclusion.*

due process of law under the Fourteenth Amendment of the Constitution of the United States of America.

- (d) Find that where as here (1) a temporary rate reduction is ordered after compliance with procedural due process, and (2) the Legislature has provided that the utility may recoup if it is determined the temporary rate has been too low, a utility against whom such a rate is issued may not be heard to complain that the rate is issued in violation of the Fourteenth Amendment to the Constitution of the United States of America.

All of which is respectfully submitted,

HERBERT B. COHEN,

Counsel, Utility Consumers  
League of York, Pennsylvania.

